Supreme Court, U.S.
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NO. 09-489

IN THE

Supreme Court of the United States

THERESA D'JAMOOS, *ET AL.*,

Petitioners,

v.

PILATUS AIRCRAFT, LTD.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

Respondent's Brief in Opposition does not deny that there is a conflict in the lower courts regarding the question presented. That conflict has become more striking with the recent decision of the Supreme Court of New Jersey in *Nicastro v. McIntyre Machinery America, Ltd.*, 987 A.2d 575 (N.J. 2010), which conflicts with the decision below.

Pilatus instead asserts that this case is moot because Petitioners voluntarily dismissed in Colorado their claim that the Colorado court had jurisdiction to hear the same substantive claims asserted here to be justiciable in Pennsylvania. Petitioners did not, pursuant to Supreme Court Rule 46, dismiss their claim, pending in this court, that the Pennsylvania court had jurisdiction to hear claims pending against Pilatus. That question was and is pending in this court and in no other court. It was never within the jurisdiction of the Colorado court, and no action taken there affected the claims pending in this Court.

Pilatus also asserts that the plane at issue here, a PC-12 sold initially in France before being re-sold into the United States, was not part of the stream of commerce Pilatus aims at the United States. Pilatus purposely designs and manufactures the PC-12 plane to meet Federal Aviation Administration standards so that the plane can be sold and operated in United States. It sells two thirds of those planes in the United States, earning half of its worldwide profits from those sales. At the initial sale of any of these planes Pilatus profits from their ability to be sold

and operated in the United States. Pilatus was purposefully exploiting the United States market, and whether it may be held responsible for six deaths caused here by a defective plane is legitimately a question presented by this case.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER PETITIONERS' CLAIMS AGAINST PILATUS

In this case the Third Circuit decided two issues: it affirmed a finding of the Pennsylvania district court that it could not exercise personal jurisdiction over Pilatus; and it reversed and remanded a finding that Petitioners' had not made a *prima facie* showing that a district court in Colorado might exercise personal jurisdiction over Pilatus. Pet. App. 31a, 61a-62a.

Petitioners timely sought review in this court of the first issue. That action divested lower courts of "control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982).[1] In *Griggs* this Court was discussing the relationship between district courts and courts of appeals, but the principle at play—that a higher and a lower court ought not simultaneously

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[1] *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395-96 (1990), for examples of the kinds of collateral matters over which lower courts may continue to exercise jurisdiction pending appeal. *See also In re Grand Jury Proceedings Under Seal*, 947 F.2d 1188, 1190 (4th Cir. 1991) (district court retains jurisdiction over matters "in aid of the appeal.").

deal with the same substance—is equally applicable to the relationship between this court and lower courts. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 114 n.10 (1996) (Souter, J. dissenting on other grounds) (applying doctrine to jurisdiction of this Court).

The pendency of the first issue decided by the Third Circuit here divested any lower court of jurisdiction over that issue. It was not pending in either the Pennsylvania district court on remand or the Colorado court upon transfer, and it was not available in Colorado for dismissal under Fed. R. Civ. P. 41(a)(1). It could be dismissed only in this court, pursuant to Supreme Court Rule 46. Rule 46 echoes the Federal Rules of Appellate Procedure, which similarly acknowledge that the lower courts are not seized with jurisdiction to dismiss cases that have been appealed from them and are pending in higher courts. *See* Fed. R. App. P. 42.

It is well-recognized that a plaintiff can assert that multiple venues have jurisdiction over the same claims against the same party. *See, e.g., Mason v. Ohio River Co.*, 373 F.2d 69 (6th Cir. 1967). In *Mason*, plaintiffs had filed suits in Pennsylvania state court that were dismissed on inconvenient forum grounds. Plaintiffs appealed, and "in order to safeguard their rights, in case the Supreme Court of Pennsylvania affirmed the orders of dismissal, they filed the same suits in the United States District Court for the Western District of Pennsylvania." *Id.* at 70. In the interests of convenience and justice, those suits were transferred to a district court in Ohio. *Id.* The Supreme Court of Pennsylvania then reversed the lower state court and found jurisdiction in Pennsylvania. The Sixth Circuit, holding that, as

here, no prejudice accrued to the defendant from the dismissal in federal court, noted that "the plaintiff had a right to maintain a cause of action in any court having jurisdiction thereof." *Id.* at 72.

Pilatus also asserts that the issue before the court has not been finally decided and could be mooted by, for example, Petitioners "prevailing on the merits of their claim in Colorado." Br. in Opp. 8 n.2. That would not moot the claim that Plaintiff was entitled to maintain the same action in Pennsylvania, but it would likely prevent Petitioners from ever having that issue finally resolved by this Court, thereby depriving plaintiffs of their choice of forum, a choice that "should rarely be disturbed." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981).

Pilatus cites *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967), as counseling denial of certiorari because the ruling of the Third Circuit is interlocutory. But *Brotherhood of Locomotive Firemen* dealt with remand of an issue—whether there was contempt—that readily could be reviewed on subsequent vertical appeal. Absent revival of a claim in Colorado in which the claim of jurisdiction in Pennsylvania were preserved,[2] other vertical review is not possible here.

This Court's inquiry into finality is practical, informed by concern of avoiding injustice, and

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[2] If the issue of jurisdiction in Pennsylvania were ever before the Colorado court, such a revival perhaps would be possible under Fed. R. Civ. P. 60(b)(6). *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994).

advancing resolution of a case. *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-54 (1964) (noting that resolution is particularly appropriate where a matter is "'fundamental to the further conduct of the case.'"). Because no forum has jurisdiction over all parties, this litigation is necessarily piecemeal, and by dismissing the Colorado action Petitioners simply attempted what consolidation was possible.[3] Alternative vertical review of the issue pending in this court is impossible, and would be extraordinarily unlikely even if Respondent were correct that these claims were pending in Colorado at the time of dismissal. Practicality and justice suggest that the decision of the Third Circuit is final and reviewable under *Gillespie*.

II. THE PLANE THAT CRASHED IN PENNSYLVANIA WAS PART OF THE STREAM OF COMMERCE THAT PILATUS DIRECTED AT THE UNITED STATES

Pilatus asserts that the question presented does not arise in this case because the plane that crashed in Pennsylvania, having first been sold in France before having been re-sold into the United States, was not part of the stream of commerce Pilatus directed at the United States. Br. in Opp. 9-10. By designing and manufacturing its plane to FAA specifications,[4] selling two-thirds of its planes in the

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[3] *See* Petitioner's letter to court of November 20, 2009; Br. in Opp. 6-7.

[4] Beginning in the early 1990s, Pilatus designed the PC-12 aircraft to meet FAA certification requirements, a

United States, and generating half its worldwide profits from those sales, Pilatus purposefully and successfully availed itself of the United States market. That a plane originally sold elsewhere is flown in any state of the United States is design, not happenstance. That it might crash and cause harm here is foreseeable to the Respondent, regardless of where the plane originally was sold.

At the point of sale of each plane, regardless of where sold, Pilatus profited from the capacity of each plane to be registered and operated in the United States. The Third Circuit gave credence to this fact, Pet. App. 44a n.14, but rejected it as satisfying its requirement that Pilatus "'injected its goods, albeit indirectly, into the forum State,'" Pennsylvania. Pet.

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prerequisite to sale or operation of the plane here. *See* 49 U.S.C. § 44704(a); 14 C.F.R. § 21.21; (3rd Cir. R. App. Vol. II 70-78). Under the certification process, a manufacturer must receive a "type certificate" indicating the FAA's approval of an aircraft's basic design and ensuring that the design complies with applicable FAA minimum design and safety regulations. 49 U.S.C. § 44704(a); 14 C.F.R. § 21.21. A manufacturer then must obtain a "production certificate," which signifies FAA approval of the manufacturing process proposed to construct the approved design. 49 U.S.C. § 44704(b); 14 C.F.R. §§ 21.139, 21.143. Before an aircraft is put into service in the United States, the owner must obtain an "airworthiness certificate" proving that the aircraft conforms to the type certificate. 49 U.S.C. § 44704(c); 14 C.F.R. § 21.183. The FAA certification process culminated in 1994 with the issuance of a type certificate for the Pilatus PC-12. That certificate permitted use of the aircraft in all fifty States and pre-empted state preclusion of the aircraft from state airspace.

App. 9a. There is no question that Pilatus aimed its stream of commerce at the United States as a whole, even if it did not aim it at Pennsylvania in particular, or that that it benefited from the capacity of this plane to be sold *and operated* in the United States, or that it injected this particular plane into the United States, "albeit indirectly." The question presented asks about the legal consequences of exactly that fact pattern. The place of first sale of this plane is not material to answering that question.

III. THE CONFLICT IN LOWER COURTS DESCRIBED IN THE PETITION RECENTLY HAS DEEPENED

Respondent does not deny that an important doctrinal conflict exists in the lower courts. That conflict deepened with the New Jersey Supreme Court's decision on February 2, 2010, in *Nicastro v. McIntyre Machinery America, Ltd.*, 987 A.2d 575 (N.J. 2010), with one dissenting justice calling for review by this Court. On facts analogous to those here—a marketing scheme designed to reach all fifty states, with harm caused in the forum—the Supreme Court of New Jersey found that statutory and constitutional standards of personal jurisdiction were satisfied. Because of the conflict between *Nicastro* and the decision of the Third Circuit in this case, in New Jersey, choice of state or federal forum is now determinative on the question of personal jurisdiction. If a plaintiff files suit in New Jersey state court, one rule for personal jurisdiction applies, yet if the same plaintiff files the same action in the federal district court, a different rule applies. This is an undesirable situation.

The New Jersey court highlighted the importance of the issue before it:

> Today, all the world is a market. In our contemporary international economy, trade knows few boundaries, and it is now commonplace that dangerous products will find their way, through purposeful marketing, to our nation's shores and into our State. The question before us is whether the jurisdictional law of this State will reflect this new reality.

Id. at 576. After finding that the New Jersey long-arm statute reached the conduct in question, the court described the constitutional issue this way:

> The preeminent issue is whether we will read the Due Process Clause in a way that renders a state, such as New Jersey, powerless to provide relief to a resident who suffers serious injuries from a product that was sold and marketed by a manufacturer, through an independent distributor, knowing that the final destination might be a New Jersey consumer.

Id. at 590. Two justices dissented, with one calling for review by this Court:

> Because the majority "has decided an important federal question in a way that conflicts with" settled federal constitutional principles, Sup. Ct. R. 10(b), creates a new, insubstantial, and

> meaningless standard for the unbounded exercise of long-arm jurisdiction, and disturbs the careful balance that limits the exercise of judicial power between and among the several states, this decision is ripe for review and correction by the Supreme Court of the United States.

Id. at 605 (Rivera-Soto, J., dissenting).

CONCLUSION

The question presented asks whether the jurisdictional law of the United States is adapted to the realities of the contemporary world. That question is presented by this case, and affects a large volume of cases. This Court should grant the Petition and answer the question.

March 16, 2010 Respectfully submitted,

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